Supreme Court, U.S.
FILED
JAN 16 1990
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 89-937

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

KAREN DE KLEINMAN,

Petitioner,

VS.

THE RESIDENTIAL BOARD OF MANAGERS OF THE OLYMPIC TOWER CONDOMINIUM, DONALD KREINDLER, T. VINCENT LEARSON, JOHN L. GRANT, DOROTHY CRAIG and IRVING LEVITT,

Respondents.

ON WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

BRIEF FOR RESPONDENTS

*FRANK E. KARELSEN, III
KURZMAN KARELSEN & FRANK
230 Park Avenue
New York, New York 10169
(212) 867-9500

**Counsel of Record*

QUESTIONS PRESENTED

I. Whether the Court has jurisdiction under 28 U.S.C. §1257(3) to review an alleged constitutional claim not raised in the State trial or intermediate appellate courts, and not properly presented to or addressed by the State's highest court.

II. Whether the denial by a State's highest court of leave to appeal from the intermediate appellate court's dismissal of an appeal for untimeliness presents a federal question under 28 U.S.C. 1257(3).

TABLE OF CONTENTS

QUESTIONS PRESENTED.....i

TABLE OF AUTHORITIES.....iii

STATEMENT OF THE CASE.....1

REASONS FOR DENYING THE PETITION.....5

1. The Constitutional Violations Claimed In The Petition Were Neither Properly Presented To Nor Ruled Upon By The State Courts.....5

2. The Dismissal of Petitioner's Appeal For Untimeliness Presents No Federal Question For This Court To Review.....7

3. No Special Or Important Reasons Exist To Warrant The Grant Of Certiorari.....8

CONCLUSION.....12

TABLE OF AUTHORITIES

PAGE

Cases:

Chicago I. & L.R. Co. v. McGuire, 196 U.S. 413 (1904).....6

Ellis v. Dixon, 349 U.S.458 (1955).....6

Fay v. Noia, 372 U.S. 391 (1963).....7

Henry v. Mississippi, 379 U.S. 443 (1965).....7

Herb v. Pitcairn, 324 U.S. 117 (1945).....7

Webb v. Webb, 451 U.S. 493 (1981).....6

Rice v. Sioux City Cemetery, 349 U.S.....9

Statutes and Rules:

28 U.S.C. §1257(3).....i, 5

Supreme Court Rule 17.....9

Supreme Court Rule 21.1(h).....6

22 NYCRR §500.11(c).....3

22 NYCRR §500.11(g).....4

22 NYCRR § 600.11(a)(3).....2

The Respondents respectfully request that this Court deny the petition for a writ of certiorari to the New York Court of Appeals.

STATEMENT OF THE CASE

This case arose under state law, and involved the sale to petitioner of a condominium unit in violation of the condominium's by-laws and without the condominium Board's having first waived its right of first refusal. The Supreme Court, New York County, granted the condominium's motion for summary judgment voiding the sale and dismissing petitioner's counterclaims (Pet. App. A. 18-25, 28-33). At no stage of the proceedings before the court of first instance did petitioner raise a Federal (or State) Constitutional claim.

Petitioner filed a notice of appeal, dated December 7, 1987 (Pet. App.A.34), but did not perfect the

appeal to the Appellate Division, First Department within the nine month period prescribed by that court's rules of practice.[1]

In January, 1989, petitioner moved to enlarge her time to perfect the appeal, arguing that various personal reasons prevented her from timely proceeding. Petitioner raised no Constitutional claim, and did not assert that she was unaware of the time requirements. The Appellate Division, First Department, denied Petitioner's motion, and granted the Respondents' cross-motion to dismiss the appeal. (Pet. App. A. 12-14).

---

1 22 NYCRR § 600.11(a)(3) provides, in pertinent part:

> "The clerk will place no civil appeal or cause on the calendar where the necessary papers and briefs are not offered for filing within nine months of the date of the notice of appeal from the judgment or order appealed from..., unless the time for filing has been enlarged by order of the court.

Petitioner then sought leave to appeal (Pet. App. A. 9-11)[2]; on July 6, 1989, the motion was dismissed on jurisdictional grounds, and otherwise denied, by the New York Court of Appeals (Pet. App. A. 7-8). Petitioner's moving papers had reiterated the arguments made to the Appellate Division. Although not permitted by the Court of Appeals,[3] petitioner also submitted reply papers, which are included as Appendix B to the petition.

---

2 Petitioner's notice of motion actually sought an order of the Court of Appeals granting an enlargement of time within which to perfect the appeal to the Appellate Division (Pet. App. A. 9-11). New York has no statutory or procedural basis for such motion or order, and the Court of Appeals treated the motion as one for leave to appeal to the Court of Appeals. The petition, however, seeks certiorari "to the New York Court of Appeals to permit an extension and enlargement of petitioner's time to file and perfect her appeal" (Pet. 10), rather than to review the denial of leave to appeal.

3 "Reply briefs or memoranda are not permitted by the court's motion practice" 22 NYCRR § 500.11(c).

Petitioner then sought reargument of her motion for leave for appeal (Pet. App. A. 4-6). It was at this stage of the proceedings that petitioner first claimed, in her moving papers, that respondents had violated her Constitutional rights (Pet. 19).[4] The Court of Appeals denied the motion, without explanation and without mention of petitioner's purported Constitutional claims. (Pet. App. A.1).

---

4 A motion for reargument to the Court of Appeals

> "may not be based on the assertion for the first time of new points except for extraordinary and compelling reasons." 22 NYCRR §500.11(g)

Petitioner also claimed, for the first time on the motion for reargument, that her prior attorneys failed to advise her of the time limit for perfecting the appeal.

REASONS FOR DENYING THE PETITION

1. The Constitutional Violations Claimed In The Petition Were Neither Properly Presented To Nor Ruled Upon By The State Courts.

Petitioner attempts to invoke the Court's jurisdiction under 28 U.S.C. §1257(3) (Pet. 5-6) by asserting that respondents violated her constitutinoal rights by denying her freedom of speech and expression' (Pet. ii) and refusing to waive the right of first refusal (Pet. ii-iii), and that the failure by the court of first instance to consider these Constitutional violations constituted 'judicial enforcement of private discrimination' in violation of the Fourteenth Amendment (Pet. 19-20).[5]

Even if the arguments in the petition are construed to assert claims arising under the Constitution, they

---

5 The court's failure to consider the arguments resulted from their not having been raised, negating any claimed Constitutional violation, Fourteenth Amendment or otherwise.

were not adequately "set up or claimed," or decided, in the State court system in order to confer jurisdiction under 28 U.S.C. 1257(3). E.g. Webb v. Webb, 451 U.S. 493 (1981).

Petitioner concedes that the questions sought to be reviewed were first raised in her motion for reargument to the Court of Appeals (Pet. 19). See Supreme Court Rule 21.1(h). She cannot show that the Court of Appeals' summary denial of reargument was not based on a determination of the Constitutional claims rather than independent State grounds, including petitioner's failure to raise the constitutional claims in the lower courts. Chicago I.& L.R. Co. v. McGuire, 196 U.S. 128 (1904); See, Ellis v. Dixon, 349 U.S. 458, reh. denied 350 U.S. 855 (1955).

2. The Dismissal Of Petitioner's Appeal For Untimeliness Presents No Federal Question For This Court To Review.

The Supreme Court's "only power over state court judgments is to correct them to the extent that they incorrectly adjudged federal rights" Fay v. Noia, 372 U.S. 391, 430 n.40 (1963), quoting Herb v. Pitcairn, 324 U.S. 117, 125, 126 (1945).

No federal rights were adjudged by the Appellate Division's dismissal of petitioner's appeal and denial of her motion to enlarge the proscribed time limit, or by the Court of Appeals' denial of leave to appeal.[6]

---

6 Petitioner does not claim that the Appellate Division's nine month limitation does not serve a "legitimate state interest" or was applied to prevent a determination of petitioner's then unasserted Constitutional claims. See, Henry v. Mississippi, 379 U.S. 443, 447 448, reh. denied 380 U.S. 926 (1965).

Petitioner's arguments do not convert a state procedural issue into a federal question. Her claim that the Court of Appeals misapplied the doctrine of finality when dismissing her motion for leave to appeal (Pet.(i), 21-31) is, at best, academic, as the court's order also "otherwise denied" the motion (Pet. App.A.7-8). Nor is there any substance to her claim, first made on the reargument motion, that she was deprived of due process by her attorney's failure to advise her of the Appellate Division's time limitations (Pet. iv-v), or by her personal reasons for not timely perfecting the appeal (Pet. v-vi).

3. No Special Or Important Reasons Exist To Warrant The Grant Of Certiorari.

Even if this Court had jurisdiction and petitioner had presented a federal question, the Petition raises no question of substance or public

importance to warrant review. Supreme Court Rule 17; Rice v. Sioux City Cemetery, 349 U.S. 70, 73-75 (1955) (on rehearing).

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

FRANK E. KARELSEN, III
KURZMAN KARELSEN & FRANK
Counsel for Respondents
230 Park Avenue
New York, New York 10169
(212) 867-9500

/165.